

1 JEFFREY D. GOLDMAN (SBN 155589)  
jgoldman@loeb.com  
2 KAREN R. THORLAND (SBN 172092)  
kthorland@loeb.com  
3 DONALD A. MILLER (SBN 228753)  
rcatalano@loeb.com  
4 LOEB & LOEB LLP  
10100 Santa Monica Boulevard, Suite 2200  
5 Los Angeles, California 90067-4120  
Tel: 310-282-2000/Fax: 310-282-2200

6 Attorneys for Plaintiffs

7  
8 UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
9

10 ARISTA RECORDS LLC, a Delaware  
limited liability company; ATLANTIC  
RECORDING CORPORATION, a  
11 Delaware corporation; BMG MUSIC, a  
New York general partnership; CAPITOL  
12 RECORDS, LLC, a Delaware limited  
liability company; CAROLINE  
13 RECORDS, INC., a New York  
corporation; ELEKTRA  
14 ENTERTAINMENT GROUP INC., a  
Delaware corporation; EMI CHRISTIAN  
15 MUSIC GROUP, INC., a California  
corporation; LAFACE RECORDS LLC, a  
16 Delaware limited liability company;  
PRIORITY RECORDS, LLC, a Delaware  
17 limited liability company; SONY BMG  
MUSIC ENTERTAINMENT, a Delaware  
18 partnership; UMG RECORDINGS, INC.,  
a Delaware corporation; VIRGIN  
19 RECORDS AMERICA, INC., a  
California corporation; WARNER BROS.  
20 RECORDS INC., a Delaware corporation;  
ZOMBA RECORDINGS, LLC, a  
21 Delaware limited liability company,

22 Plaintiffs,

23 v.

24 MYXER INC., f/k/a mVISIBLE  
TECHNOLOGIES, INC.; MICHAEL  
25 "MYK" WILLIS, an individual; SCOTT  
KINNEAR, an individual, and RON  
26 HARRIS, an individual,

27 Defendants.  
28

Case No. CV 08-03935 GAF (JCx)

The Honorable Gary A. Feess

**PLAINTIFFS' MEMORANDUM RE  
ISSUES TO BE ADDRESSED AT  
OCTOBER 30, 2009 DISCOVERY  
HEARING**

Date: October 30, 2009  
Time: 3:00 p.m.  
Ctmm: 740

Disc. Cutoff: November 16, 2009  
Pretrial Conf.: January 4, 2010  
Trial Date: February 2, 2010

**Preliminary Statement**

1  
2 Plaintiffs file this brief out of an abundance of caution, and the need for the  
3 Court to consider it depends (at least in large part) on the outcome of Plaintiffs’  
4 motion for evidentiary sanctions currently set for hearing on October 23. The  
5 document requests, interrogatories, and requests for admission at issue on this  
6 motion were propounded in July and August, in a “belt-and-suspenders” effort to  
7 ensure that Myxer could not evade production of certain specific documents and  
8 information already responsive to Plaintiffs’ first set of document requests, but as  
9 yet unproduced. When this Court ordered Myxer on July 31 to fully and completely  
10 comply with the Court’s April 28 Order, Plaintiffs anticipated receiving such  
11 documents and information by mid-August, as ordered by the Court, but as the  
12 Court is aware from the Motion for Evidentiary Sanctions, this did not occur. The  
13 remedies sought by Plaintiffs in the motion for evidentiary sanctions, if granted by  
14 the Court, would largely render moot the discovery requests presented on this  
15 Memorandum, but as discovery is nearing its end in this case, and Plaintiffs do not  
16 know the outcome of the Motion for Evidentiary Sanctions, Plaintiffs have no  
17 choice but to present these issues to the Court at this time. Depending on the  
18 outcome of the Court’s ruling on the Motion for Evidentiary Sanctions, the issues  
19 presented herein can be narrowed or eliminated.

20 In the event that the Court denies Plaintiffs’ Motion for Evidentiary Sanctions  
21 in whole or in part, Plaintiffs request that Myxer be ordered to respond fully and  
22 completely to the specific discovery requests identified below. Myxer has refused  
23 to provide simple yet undeniably relevant discovery by providing boilerplate,  
24 nonsensical objections and evasive responses to Plaintiffs’ requests, including  
25 Plaintiffs’ Fourth Set of Requests for Production of Documents and Tangible  
26 Things; Fifth Set of Requests for Production of Documents and Tangible Things;  
27 Plaintiffs’ Second Set of Requests for Admission; and plaintiff Caroline Records’  
28

1 Special Interrogatories.<sup>1</sup> Myxer should be ordered to produce documents in  
 2 response to the Fourth and Fifth Set of Requests for Production and to provide full,  
 3 complete, substantive, and non-evasive responses to the Requests for Admission and  
 4 Interrogatories.

### 5 Argument

#### 6 **A. Myxer Should Be Compelled to Produce Documents in Response to** 7 **Plaintiffs' Fourth Set of Requests for Production of Documents**

8 On July 24, 2008, Plaintiffs propounded their Fourth Set of Requests for  
 9 Production [Nos. 81-103] (the "Fourth Set"). Declaration of Donald A. Miller  
 10 ("Miller Decl.") ¶ 2, Ex A. The Fourth Set included the following requests:

11 **Request No. 82:** All DOCUMENTS that constitute, embody,  
 12 reflect, or refer to the "table of downloads" referred to on page 6 of  
 13 "Myxer's Inc.'s Memorandum re Issues to be Addressed at July 31,  
 2009 Discovery Hearing," dated July 22, 2009.

14 **Request No. 83:** All DOCUMENTS that constitute, embody,  
 15 reflect, or refer to the information on the "full audit list" – regardless of  
 16 the document's formal or actual name or the manner in which  
 17 individuals commonly refer to it – as Myk Willis used that term in his  
 August 1, 2007, email to Gina Balcom, Steve Spiro, and Scott Kinnear  
 number-stamped MYX 2053310.

18 **Request No. 84:** All DOCUMENTS that constitute, embody,  
 19 reflect, or refer to data collected as a result of MYXER's efforts to  
 20 "keep[] track of what content a person downloads," as Myk Willis  
 21 stated in his August 1, 2007, email to Gina Balcom, Steve Spiro, and  
 Scott Kinnear number-stamped MYX 2053310.

---

22  
 23 <sup>1</sup> Caroline Records has since dismissed its claims, but Fed. R. Civ. P. 37 does  
 24 not restrict discovery motions to interrogatories propounded by the party making the  
 25 motion. See Fed. R. Civ. P. 37(a)(3)(B)(iii) (discovery motion may be made if "a  
 26 party fails to answer an interrogatory submitted under Rule 33"). By contrast, when  
 27 Congress chose to impose such a limitation, it did so explicitly, such as in Rule 36  
 28 concerning requests for admission. See Fed. R. Civ. P. 36(a)(6) ("***The requesting***  
***party*** may move to determine the sufficiency of an answer or objection.") (emphasis  
 added).

**Request No. 85:** All DOCUMENTS that constitute, embody, reflect, or refer to the following “Tables” or reports (from their inception to present, including all versions and all columns in each version) referred to by Wayne Kemble in his July 17, 2007 email to “dev” sent at or about 6:05 p.m.:

- (a) “SongTable”
- (b) “ProfileTable” (including all columns)
- (c) “ContentTable”
- (d) “UploadTable”
- (e) “RingtoneTable”
- (f) “UserTable”
- (g) “RatingTable”
- (h) “TagTable”
- (i) “CommentTable”
- (j) “AdministratorTable”
- (k) “UnknownUserAgentTable”
- (l) “AdWapTable”
- (m) “EmailBlackListTable”
- (n) “ProductSaleTable”
- (o) “SegmentTable”
- (p) “VerificationTable”
- (q) “CarrierTable”
- (r) “FanTable”
- (s) “SmsAuditTable”
- (t) “DownloadTable”
- (u) “HotTopicTable”

**Request No. 86:** All DOCUMENTS that constitute, embody, reflect, or refer to the “SongRecord” (from its inception to present, including all versions) referred to by Scott Clark in his May 28, 2008 email to Chris Wilson sent at or about 18:07:04 EDT.

**Request No. 87:** All DOCUMENTS that constitute, embody, reflect or evidence any ringtone that has ever been downloaded or sent to a cell phone from or by use of any website MYXER owns, operates or controls.

**Request No. 88:** All DOCUMENTS that reflect any of the following information related to any ringtone that has ever been downloaded or sent to a cell phone from or by use of any website MYXER owns, operates or controls: (1) the name of the ringtone file; (2) the tags associated with the ringtone file; (3) any data associated

1 with the ringtone file that enables a person to search for the ringtone by  
 2 use of MYXER's or any other search engine; (4) the size of the  
 3 ringtone file; (5) the URL where the file or ringtone is or was located;  
 4 (6) the name of the song; (7) the name of the artist that performed on  
 5 the song; (8) the username and/or identity of the Myxer user who  
 6 downloaded or sent the song; (9) the date the ringtone was downloaded  
 7 or sent to a cell phone; (10) the identity of the device to which the  
 8 ringtone was downloaded or sent; and (11) the username and/or  
 9 identity of the Myxer user who posted or uploaded the song to the  
 10 website MYXER owns, operates or controls.

11 **Request No. 89:** All DOCUMENTS that embody or reflect any  
 12 of the following information related to any ringtone embodying any  
 13 sound recording (or any portion thereof) owned by any of the plaintiffs  
 14 that has ever been downloaded or sent to a cell phone from or by use of  
 15 any website MYXER owns, operates or controls: (1) the name of the  
 16 ringtone file; (2) the tags associated with the ringtone file; (3) any data  
 17 associated with the ringtone file that enables a person to search for the  
 18 ringtone by use of MYXER's or any other search engine; (4) the size of  
 19 the ringtone file; (5) the URL where the file or ringtone is or was  
 20 located; (6) the name of the song; (7) the name of the artist that  
 21 performed on the song; (8) the username and/or identity of the Myxer  
 22 user who downloaded or sent the song; (9) the date the ringtone was  
 23 downloaded or sent to a cell phone; (10) the identity of the device to  
 24 which the ringtone was downloaded or sent; and (11) the username  
 25 and/or identity of the Myxer user who posted or uploaded the song to  
 26 the website MYXER owns, operates or controls.

27 **Request No. 90:** All DOCUMENTS that embody or reflect any  
 28 of the following information related to any ringtone embodying any  
 sound recording (or any portion thereof) at issue in this case that has  
 ever been downloaded or sent to a cell phone from or by use of any  
 website MYXER owns, operates or controls: (1) the name of the  
 ringtone file; (2) the tags associated with the ringtone file; (3) any data  
 associated with the ringtone file that enables a person to search for the  
 ringtone by use of MYXER's or any other search engine; (4) the size of  
 the ringtone file; (5) the URL where the file or ringtone is or was  
 located; (6) the name of the song; (7) the name of the artist that  
 performed on the song; (8) the username and/or identity of the Myxer  
 user who downloaded or sent the song; (9) the date the ringtone was  
 downloaded or sent to a cell phone; (10) the identity of the device to  
 which the ringtone was downloaded or sent; and (11) the username

1 and/or identity of the Myxer user who posted or uploaded the song to  
2 the website MYXER owns, operates or controls.

3 **Request No. 91:** All DOCUMENTS that embody or reflect any  
4 of the following information related to any ringtone of any sound  
5 recording (or any portion thereof) listed in Schedule A of the  
6 Complaint that has ever been downloaded or sent to a cell phone from  
7 or by use of any website MYXER owns, operates or controls: (1) the  
8 name of the ringtone file; (2) the tags associated with the ringtone file;  
9 (3) any data associated with the ringtone file that enables a person to  
10 search for the ringtone by use of MYXER's or any other search engine;  
11 (4) the size of the ringtone file; (5) the URL where the file or ringtone  
12 is or was located; (6) the name of the song; (7) the name of the artist  
13 that performed on the song; (8) the username and/or identity of the  
14 Myxer user who downloaded or sent the song; (9) the date the ringtone  
15 was downloaded or sent to a cell phone; (10) the identity of the device  
16 to which the ringtone was downloaded or sent; and (11) the username  
17 and/or identity of the Myxer user who posted or uploaded the song to  
18 the website MYXER owns, operates or controls.

19 **Request No. 92:** All DOCUMENTS that constitute, embody,  
20 reflect, or refer to any videos uploaded by MYXER to  
21 www.youtube.com, including but not limited to the videos themselves,  
22 raw footage or material, edited footage or material, unused footage or  
23 material, and outtakes, and DOCUMENTS reflecting any discussion of  
24 such videos.

25 **Request No. 93:** All DOCUMENTS that constitute, embody, or  
26 reflect any data or information contained at any time on any version or  
27 draft of the Excel spreadsheet MYXER produced in this lawsuit on or  
28 about April 5, 2009, and number-stamped MYX 007, which was  
removed, hidden, deleted, or otherwise made inaccessible to Plaintiffs  
prior to its production of MYX 007 on or about April 5, 2009.

**Request No. 94:** All DOCUMENTS that constitute, embody, or  
reflect the column headings for the Excel spreadsheet MYXER  
produced in this lawsuit on or about April 5, 2009, and number-  
stamped MYX 007.

Id. Myxer responded to each of these document requests with boilerplate,  
obstructive, and meritless objections. Id. ¶ 2, Ex. B. As an example, consider the  
following: In the Court's Order dated July 17 (Docket No. 74), the Court required



1 Myxer's counsel to inquire of Myxer about a document requested by Plaintiffs in a  
 2 prior discovery brief, called the "full audit list," referenced by CEO Myk Willis in  
 3 an email. *Id.*, Ex. H ("We've been keeping a **full audit list** of every download since  
 4 the beginning of time . . .") (emphasis added).<sup>2</sup> In response to the Court's Order,  
 5 Myxer stated evasively, "No documents exists entitled 'Full Audit List.' There is a  
 6 table of downloads as titled by the user or the artist. The actual document does not  
 7 appear to be responsive to any request, however the titles on the table are  
 8 encompassed in other documents which have been produced." Myxer's Inc.'s  
 9 Memo re Issues to be Addressed at July 31, 2009 Discovery Hearing, dated July 22,  
 10 2009 [Docket No. 161] at 6. Based on this representation, Plaintiffs propounded  
 11 Request No. 82, *quoting exactly the language from Myxer's July 22 brief*:

12 All DOCUMENTS that constitute, embody, reflect, or refer to the  
 13 "table of downloads" referred to on page 6 of "Myxer's Inc.'s  
 14 Memorandum re Issues to be Addressed at July 31, 2009 Discovery  
 15 Hearing," dated July 22, 2009.

15 Miller Decl., Ex. A (Request No. 82). Yet, Myxer still responded with boilerplate  
 16 objections, including, incredibly, "on the grounds that it is vague and ambiguous."  
 17 *Id.*, Ex. B at 7. Similarly, Plaintiffs also propounded these requests, this time  
 18 quoting exactly from the Myk Willis email (*see* fn. 2):

19 All DOCUMENTS that constitute, embody, reflect, or refer to the  
 20 information on the "full audit list" – regardless of the document's  
 21 formal or actual name or the manner in which individuals  
 22 commonly refer to it – as Myk Willis used that term in his August  
 23 1, 2007, email to Gina Balcom, Steve Spiro, and Scott Kinnear  
 24 number-stamped MYX 2053310.

25 <sup>2</sup> The Myk Willis email states, in pertinent part: "We're going to have to be  
 26 creative to get truly valuable behavioral targeting. For example, **keeping track of**  
 27 **what content a person downloads** is going to be far more valuable than forcing  
 28 them to answer the question 'what is your favorite music genre?' in the long run."  
 Miller Decl., Ex. H (emphasis added). We've been keeping a full audit list every  
 download since the beginning of time to aid in thise."

1 All DOCUMENTS that constitute, embody, reflect, or refer to data  
 2 collected as a result of MYXER's efforts to "keep[] track of what  
 3 content a person downloads," as Myk Willis stated in his August 1,  
 4 2007, email to Gina Balcom, Steve Spiro, and Scott Kinnear  
 number-stamped MYX 2053310.

5 Id., Ex. A (Request Nos. 83 and 84). Again, Myxer responded with boilerplate  
 6 objections and refused to produce documents.

7 As the Court is aware in connection with Plaintiffs' evidentiary sanctions  
 8 motion, the documents responsive to Plaintiffs' fourth set of requests for production  
 9 are also responsive to Plaintiffs' first set of requests for production, and Myxer  
 10 should have produced such documents long ago as required by this Court's April 28  
 11 and July 31 Orders. However, if, for whatever reason, the Court finds that these  
 12 documents were somehow not encompassed within and responsive to the first set,  
 13 then the Court should now compel Myxer's production of these documents. They  
 14 are clearly relevant to Plaintiffs' claims that Myxer has reproduced and downloaded,  
 15 and facilitated the download of, Plaintiffs' copyrighted sound recordings in violation  
 16 of Plaintiffs' exclusive distribution right, 17 U.S.C. § 106(3); that Myxer has actual  
 17 or constructive knowledge of Plaintiffs' works and its users' activities, which is  
 18 relevant to the doctrine of contributory copyright infringement and Myxer's  
 19 disentitlement to DMCA safe harbor; and that Myxer has induced infringement  
 20 through its advertisements, promotional materials, and other communications with  
 21 users or potential users of its website.

22 **B. Myxer Should Be Compelled to Produce Documents in Response to**  
 23 **Plaintiffs' Fifth Set of Requests for Production of Documents**

24 Myxer's responses to Plaintiffs' Fifth Set of Requests for Production [104-  
 25 112] were just as improper. In Request No. 104, Plaintiffs requested the (a)  
 26 "Content Take Down Table," (b) Producer Table, (c) the "Segment Table," (d) the  
 27 "label BlackList," (e) the Myxer "internal Wiki," (f) "Downloads by producer," (g)  
 28 the "RingtoneAuditTable," (h) the SmsKeywordTable," and (i) the Download



1 Success Summary.” Id., Ex. C. For each of the items requested in Request No. 104,  
 2 Plaintiffs also referenced – and even attached to the requests – a document produced  
 3 by Myxer that discusses and demonstrates the relevance of the particular item  
 4 requested. See, e.g., id., Exhibit 1 [Myxer internal email re “ContentTakeDown  
 5 Table” – Request No. 104(a): appears to contain items taken down as a result of a  
 6 DMCA request]; Exhibit 4 [Myxer internal email re “label BlackList” – Request No.  
 7 104(d): “When an artist shares content, we check if the label that is returned from  
 8 Audible [Magic] is in our ‘labelBlackList’”]; Exhibit 8 [Myxer internal email re  
 9 “SmsKeywordTable” – Request No. 104(h): appears to contain key words that  
 10 facilitate ads sent to cell phone, via SMS messaging, during the downloading  
 11 process]. Myxer responded with boilerplate objections. Id., Ex. D.

12 Similarly, Myxer responded with boilerplate objections to the following  
 13 requests within the Fifth Set: No. 105 (“the 5,000 ringtones files most frequently  
 14 downloaded”), even though Bill Madden testified that such a document could be  
 15 produced (Madden Depo. [Miller Decl., Ex. G] at 265:23-266:4); No. 106 (Myxer’s  
 16 “‘Stay Down List’ referred to by William Madden in his July 28 deposition”); No.  
 17 107 (“any report or data generated from YOUR use of Audible Magic technology”);  
 18 No. 110 (“All DOCUMENTS that reflect or evidence all of the ringtones (identified  
 19 by Content ID) that have been downloaded by Myk Willis from any website  
 20 operated or controlled by YOU.”); No. 111 (“All DOCUMENTS that reflect or  
 21 evidence all of the ringtones (identified by Content ID) that have been downloaded  
 22 by Scott Kinnear from any website operated or controlled by YOU.”); No. 112  
 23 (“YOUR ‘Production Database’ – referred to by William Madden in his July 28,  
 24 2009, deposition (the pertinent excerpt of which is attached hereto as Exhibit 11) –  
 25 in native format.”). Miller Decl., Ex. C. Again, each request was met with  
 26 boilerplate objections, and Myxer has refused to produce documents responsive the  
 27 requests. Id., Ex. D. Myxer should be compelled to do so. Request No. 107 is of  
 28 particular importance, because the reports that Myxer received from Audible Magic

1 would expressly inform Myxer that Plaintiffs own the copyrights in their works and  
2 that Plaintiffs do not authorize Myxer to make them available and demand that they  
3 be blocked – critically important evidence of Myxer’s knowledge of infringement.

4 **C. Myxer Should Be Compelled To Provide Full, Complete, and Non-**  
5 **Evasive Responses to Plaintiffs’ Requests for Admission and**  
6 **Corresponding Interrogatories**

7 From March to May 2009, Myxer produced six hard drives on six separate  
8 occasions containing collectively over 1.4 million music files. Miller Decl ¶ 3.

9 Along with the hard drives, Myxer produced an Excel file, called the “Myxer Song  
10 Data Spreadsheet” (also referred to as the “Song List”), presumably containing data  
11 regarding the 1.4 million music files. *Id.* Plaintiffs’ Requests for Admissions Nos.  
12 309, 310, and 311 seek confirmation of precisely what these materials represent.

13 Myxer responded evasively. For example, in RFA No. 309, Plaintiffs requested that  
14 Myxer “[a]dmit that the hard drives produced by MYXER in this lawsuit and  
15 number stamped MYX004, MYX005, MYX006, MYX008, MYX011 and  
16 MYX012, *were copied from hard drives owned or controlled by MYXER* between  
17 March and May 2009, inclusive.” *Id.*, Ex. E. (emphasis added). Myxer responded:  
18 “Myxer admits that it produced hard drives number stamped MYX004, MYX005,  
19 MYX006, MYX008, MYX011 and MYX012 between March and May 2009.” *Id.*  
20 Obviously, Plaintiffs already knew that; this response is inherently evasive. Myxer  
21 responded *exactly* the same way to RFA No. 310 and RFA No. 311, in which  
22 Plaintiffs requested further information regarding the hard drives and the Song Data  
23 Spreadsheet, as Myxer did in RFA No. 309 – admitting only that the hard drives  
24 were produced between March and May 2009. *Id.*

25 In RFA Nos. 312, 313, and 314, Plaintiffs sought other information relating to  
26 the Hard Drives and Song List. Again, Myxer’s response – which was the same for  
27 each request – was evasive. For example, in RFA No. 313, Plaintiffs requested:

28 Admit that MYXER has not produced in this lawsuit any documents  
that evidence or reflect when any of the MP3 files contained on the

1 hard drives number stamped MYX004, MYX005, MYX006,  
2 MYX008, MYX011 and MYX012 was first copied to a computer  
3 server owned or controlled by MYXER and made accessible to the  
public through any website owned or controlled by MYXER.

4 Id. Myxer responded to RFA No. 313, and to RFA 312 and 314, exactly the same:  
5 “Myxer is unable to respond to this request as drafted.” Id. Likewise, in the  
6 interrogatories corresponding to RFA Nos. 309 to 314 (i.e., Plaintiff Caroline  
7 Records Interrogatory Nos. 4 to 9) – e.g., “If your response to Request for  
8 Admission No. [309-314] is anything other than an unqualified admission, state all  
9 facts that support your response” – Myxer provided only boilerplate objections to  
10 every interrogatory. Id., Ex. F.

11 Finally, Plaintiff Caroline Records propounded three interrogatories [Nos. 1-  
12 3] requesting information related to the MP3 files on the hard drives that Myxer  
13 produced and the data contained on the Song List (Nos. 1-3). Id.<sup>3</sup> Again, each  
14 interrogatory was met with boilerplate objections.

### 15 Conclusion

16 This Court should compel Myxer to respond to Plaintiffs’ Fourth Set of  
17 Requests for Production and Plaintiffs’ Fifth Set of Requests for Production,  
18 Plaintiffs’ Requests for Admission, and the Interrogatories.

19 Dated: October 21, 2009

LOEB & LOEB LLP

20  
21 By: /s/ Jeffrey D. Goldman

Jeffrey D. Goldman

22 Attorneys for Plaintiffs  
23  
24  
25  
26

27 <sup>3</sup> For example, the Excel file does not contain any column headings, and is  
28 missing hundreds of thousands of rows of data. Miller Decl. ¶ 3.